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July 21, 2004

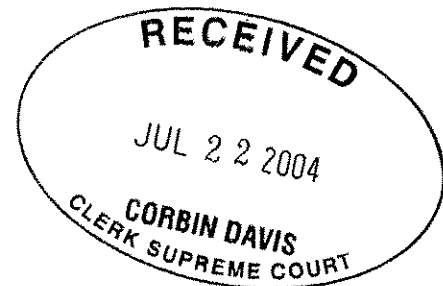
Mr. Corbin R. Davis, Clerk  
Michigan Supreme Court  
Hall of Justice, Second Floor  
925 West Ottawa Street  
P.O. Box 30052  
Lansing, MI 48915

Re: *ADM File No. 2002-34*

Dear Mr. Davis:

I am an attorney who has specialized in appellate litigation for over 20 years. I have practiced in a relatively large firm, which is principally engaged in the defense of personal injury claims. I write this letter as a member of the "appellate bar", in response to the request for public comment on the "case management" proposal which has been submitted to your Court for consideration and adoption as an administrative order. As proposed, this administrative order would provide a trial period of two years, during which all appeals arising from motions for summary disposition would be placed on a "fast track" for processing within the Michigan Court of Appeals. Significant restraints would be placed on the time permitted for both the preparation of the appellate briefs, as well as for the preparation of the Court's opinion. Moreover, significant page restrictions would apply to the appellate briefs submitted to the Court. Reply briefs would not be permitted as a matter of right, and there would ordinarily be no oral argument. The goal, as presently formulated, would be to release an opinion, and thereby conclude the appeal before the Michigan Court of Appeals, within 180 days from the filing of the claim of appeal.

The proposal also contemplates that some appeals concerning motions for summary disposition will be excluded from the "fast track", either by motion of one of the parties, or at the direction of the Court, although it is not clear how the case would proceed if the Court were to consider the appeal inappropriate for "fast track" handling



after the briefing had been accomplished. In other words, it is not clear if the rule would permit for "fast track" handling insofar as briefing is concerned, with all of the advocacy constraints attendant thereto, but not insofar as decision-making is concerned.

It is also noteworthy that while this proposal will decrease the time a case pends on appeal, it is likely to increase the expense of that appeal. Extensions of time can only be obtained on motion, with the preparation of a motion, and the payment of a motion fee. Cases may only be removed from the fast track (at least by the parties) on motion, with the payment of a motion fee. Reply briefs will only be accepted on motion. Transcripts are not required but, when ordered, may be subject to a higher per page cost payable to the court reporters who will be required to prepare the transcripts on an expedited basis. It is also likely that the legal fees incurred by the parties will increase, since the preparation of the briefs destined for the fast track will likely be more time intensive than if they remained in the general population of appeals. For one thing, there will be intense activity at the beginning of the appellate process in order to make necessary decisions concerning the proper progress of the appeal. Moreover, it takes much longer to write a short brief than a long one since it requires a more finessed presentation of the facts and analysis of the law. Further, because of the time constraints placed on appellate specialists, particularly those in small firms, choice of legal counsel may be limited because of the inability of counsel to accept responsibility for an appeal which must be given immediate attention, and which must be concluded so swiftly.

Although I am aware that the current proposal is the result of a collaborative effort on the part of the bench and the bar which began with the premises that something needed to be done to decrease the "delay" in the Court of Appeals, and that the bar needed to be included in delay reduction efforts, I am concerned that this proposal fails to distinguish "delay" from "undue delay," and will unnecessarily marginalize appellate advocacy. Moreover, some of its provisions, notably the page limitations and restriction on reply briefs, have little or nothing to do with delay. I fear that this proposal will result in (1) a significant decrease in the quality of the advocacy presented in many cases due to the severe page constraints and time limitations, (2) an institutional bias that issues which arise on motions for summary disposition are, as a rule, legally insignificant enough to warrant "fast track" handling, (3) a decline in the quality of the decision making due to the time constraints placed on the court and the perception that the issues are simple, repetitive and clear cut, and (4) a decline in the ability of appellate specialists to specialize due to their inability to commit to responsibility for more than a few appeals at a time because of the loss of time management flexibility. It seems to me that any one of these fears would be cause for serious reflection.

Unfortunately, I believe that this is a train which has already left the station, and that some delay reduction proposal will be adopted. If it is unrealistic to ask the court to put off this experiment until the effect of the current delay reduction efforts (particularly the decrease in the "warehouse") can be seen on more than a short term basis, I nevertheless encourage the court to make some changes in the current proposal:

- (1) increase the time available for the preparation of the briefs to a maximum of 56 days for the appellant's brief and 35 days for the appellee's brief, and allow for stipulated extensions (rather than motions) to reach this maximum.
- (2) increase the page limits to at least 35 pages, or leave it at the 50 page maximum applicable to all other appeals. The fact that a given issue may be deemed to belong on the fast track does not mean that it is possible to properly apprise the court of the facts, the procedural history, and the law within a mere 20 pages.
- (3) allow for the filing of reply briefs, not to exceed five pages, within 14 days.
- (4) provide that if the court removes the case from the fast track after briefing, that the parties have an opportunity to rebrief the case.
- (5) if possible, limit the experiment in some way, to randomly selected cases – perhaps every 3rd, 4th or 5th appeal filed which arises from a motion for summary disposition. In this way, the court could evaluate the proposal, without effecting 50% of the court's civil docket, and what may approach 75% of any one appellate practitioner's docket. As presently formulated, the plan is likely to place an unnecessary burden on appellate practitioners – particularly, but not exclusively, those that practice alone or in a small firm – and it will make it more difficult to assess the viability of the plan on a permanent basis.

I would also urge you to lift the constraint on the time the court, itself, has to deliberate, decide, and prepare an opinion as I believe that it is unwise to put an artificial deadline on due deliberation. However, I recognize that to do so would be inconsistent with the underlying premise of this proposal that assumes that appeals which remain on the fast track are susceptible of summary treatment by both the bench and the bar.

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Finally, I note that while the plan as proposed may succeed in shortening the average interval between the filing of a claim of appeal to the Michigan Court of Appeals and the disposition of that appeal, it may also have a significant adverse effect on the quality of the advocacy, the court's deliberative processes, and the proper development of the law. Steps should be taken to minimize this possibility.

Thank you for your consideration.

Very truly yours,



ROSALIND ROCHKIND

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